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No. 71-1597

IN THE

Supreme Court of the United States

October Term, 1971

FEDERAL POWER COMMISSION,

Petitioner,

v.

GREENE COUNTY PLANNING BOARD, ET AL.,

Respondents.

BRIEF OF RESPONDENTS GREENE COUNTY PLANNING BOARD, TOWN OF DURHAM, ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, AND SIERRA CLUB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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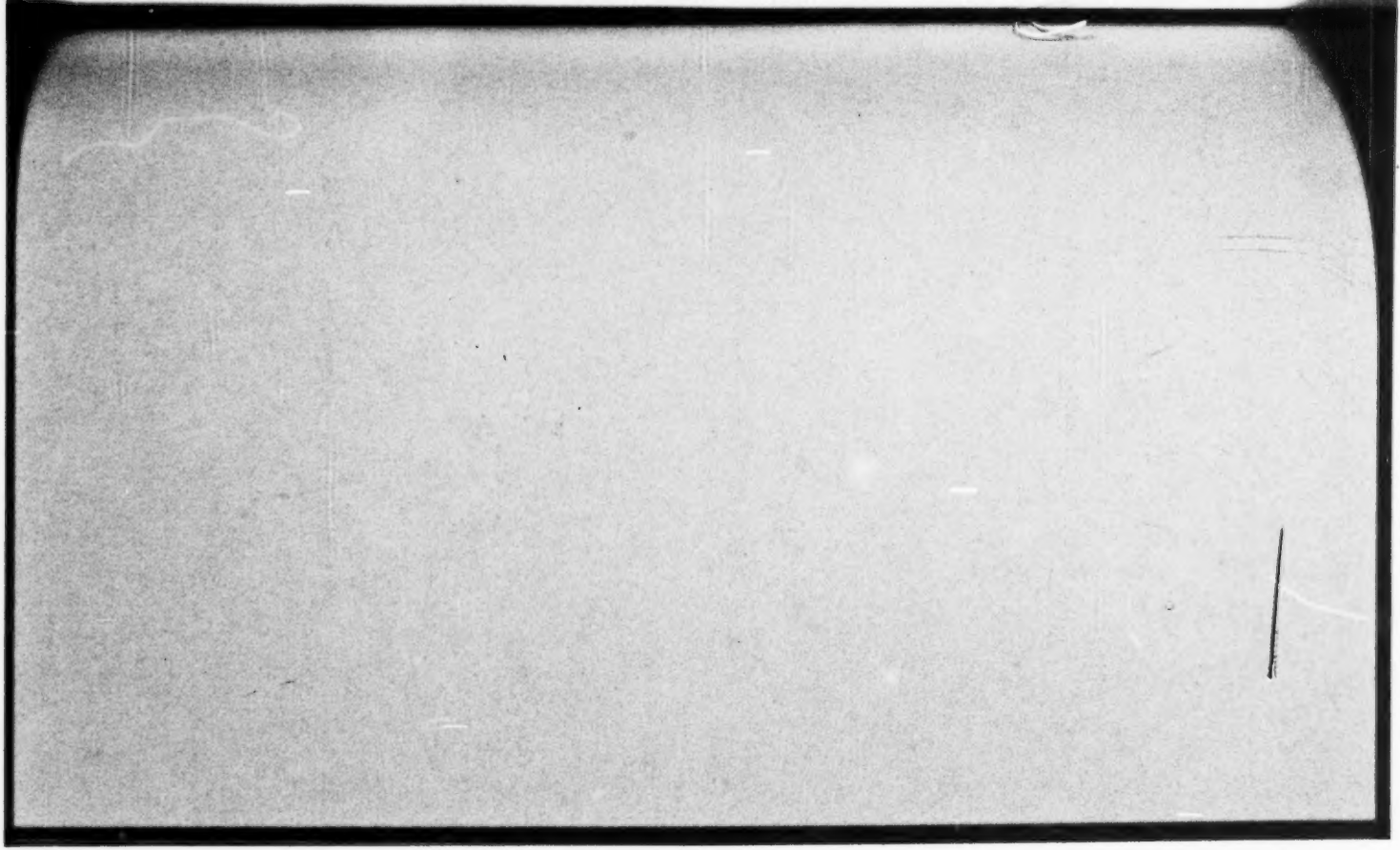

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Respondents Greene County Planning Board, Town of Durham, Association for the Preservation of Durham Valley, and Sierra Club submit this brief in opposition to the petition for a writ of certiorari.

Question Presented

Whether the Federal Power Commission ("FPC") is exempt from the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ("NEPA"), which requires all Federal agencies to prepare and publicize detailed environmental impact statements in sufficient time to accompany proposals through the existing agency review processes, and is instead permitted to include such statement in its final decision on the merits of a proposal, merely because its pre-existing review processes include, in some contested proceedings, hearings under the Administrative Procedure

Act, 5 U.S.C. § 551 *et seq.* (1967), at which environmental issues are considered along with engineering, economic and other issues.

Statement

This case arises from the "obstinate refusal" (P. 24a)* of the FPC to comply with the unequivocal requirement of NEPA that "*all* agencies of the Federal Government shall . . . include in *every* . . . major Federal action significantly affecting the quality of the human environment, a detailed [environmental impact] statement by the *responsible official* . . . [to] *accompany the proposal through the existing agency review processes.*" NEPA, § 102(2)(C) (emphasis added).

NEPA had become effective in January 1970. However, it was not until December 1970—almost a year after NEPA's effective date—that the FPC issued its Order No. 415 setting forth procedures which, it thought, were in accord with the Act. The FPC's rules then required the preparation of a detailed statement by its staff *only* in cases of *uncontested* applications; no such statement was or is required to be prepared where applications for licenses are contested.** 18 C.F.R. §§ 2.81(e)-(f) (January 1, 1971). Rather, the Commission utilizes an applicant's draft pending completion of the hearing on the merits. *See* 18 C.F.R. 2.80(b), 2.81(b), 4.41 Ex. W. The Commission does not prepare its own impact statement, as mandated by NEPA, until after it completes its review of all proceedings and decides to grant the application. The effect of these rules was to avoid the affirmative investigatory responsibility placed upon all agencies by NEPA.

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* "P." refers to the petition for a writ of certiorari. The opinion below is set forth as Appendix A thereto.

** The Commission revised its rules by Order No. 415-B on November 19, 1971. 36 Fed. Reg. 22738 (Nov. 30, 1971). Section 2.81 no longer requires the Commission to prepare its own statement in uncontested proceedings.

This is not a case of a Federal agency making a good-faith effort to comply with NEPA only to be tripped up by some *ex post facto* court-imposed technicality; nor is it a case involving a novel theory or interpretation of a statute. Rather, it is a case of the FPC maintaining, in the face of the clear language of NEPA, an order of the President (Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970)), and the rules of the agency established by NEPA as its watchdog (GUIDELINES OF THE COUNCIL ON ENVIRONMENTAL QUALITY RE: STATEMENTS ON PROPOSED FEDERAL ACTIONS AFFECTING THE ENVIRONMENT, 36 Fed. Reg. 7724 (1971)),* that it need not issue an environmental impact statement at any time before its decision on the merits of a license application, and that it can discharge its responsibilities in contested cases by relying on the applicant and other litigants—and, in uncontested cases, on the applicant alone—to identify and develop environmental issues and alternatives.

Summary of Reasons Why Writ Should Not Be Granted

The writ of certiorari should be denied because:

1. The proper remedy for petitioner's complaint is to have Congress change NEPA, which Act unequivocally dictated the decision by the Court of Appeals. All of the contentions raised in the petition were carefully reviewed and properly rejected by the Court of Appeals. Since there is no conflict with any decision of this Court or amongst the Circuits, further review by this Court is neither warranted nor necessary.

2. Petitioner substantially overstates the impact of the Court of Appeals' decision on the orderly procedures of the FPC and other Federal agencies and, in any event, mistakenly characterizes congressionally imposed requirements.

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* Hereinafter referred to as the "CEQ Guidelines."

3. The substantive reasons urged for granting the writ are without merit. The decision of the Court of Appeals is so clearly correct on the merits that the attempt to have this Court hear the case is frivolous.

I

PETITIONER'S REMEDY LIES WITH CONGRESS WHOSE CLEAR LANGUAGE AND INTENT WAS CORRECTLY EFFECTUATED BY THE COURT BELOW

A. In NEPA, Congress imposed a non-delegable responsibility on Federal agencies to identify and publicize environmental impact early in the review process

NEPA sets forth in Section 101 a broad and comprehensive statement of environmental objectives which, in effect, amends the authorizing legislation for all Federal agencies to include these environmental objectives in their legislative mandates. S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969). In addition, NEPA requires all Federal agencies to interpret and administer their policies, regulations and public laws, to the fullest extent possible, in accordance with the environmental objectives of Section 101 of NEPA. NEPA, § 102 (1). The mandatory character of NEPA is made abundantly clear by Section 105, which states that the policies and goals in NEPA are "supplementary to those set forth in existing authorizations of Federal agencies."

Section 102 (2) (C) of NEPA provides that all agencies of the Federal Government shall:

> "Include in every recommendation . . . on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed [environmental impact] statement . . ."

The section further requires that environmental statements be prepared early in an agency's review processes:

> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, *and shall accompany the proposal through the existing agency review processes*" (emphasis added).

The purpose of Section 102 of NEPA was explained in the Senate Committee Report:

> "The policies and goals set forth in section 101 can be implemented if they are incorporated into the ongoing activities of the Federal Government in carrying out its other responsibilities to the public. In many areas of Federal action there is no body of experience or precedent for substantial and consistent consideration of environmental factors in decisionmaking.
>
> "To remedy present shortcomings in the legislative foundation of existing programs, and to establish *action-forcing procedures* which will help to insure that the policies enunciated in section 101 are implemented, section 102 authorizes and directs that the existing body of Federal law, regulation, and policy be interpreted and administered to the fullest extent possible in accordance with the policies set forth in this act. It further establishes a number of operating procedures to be followed by *all Federal agencies.*"

S. REP. No. 296, 91st Cong., 1st Sess. 19-20 (1969) (emphasis added).

Thus, Congress was not content merely to direct Federal agencies to consider environmental factors. So high was congressional concern, and so distrustful was Congress of agency procedures, that NEPA forced upon Federal agencies an affirmative burden to be borne in a specified manner: through the preparation, by the *agency*, of a detailed written analysis of environmental factors at an early stage in the *existing* agency review processes *prior* to decision.

The clear mandate of NEPA was apparent to President Nixon and the Council on Environmental Quality. The procedures set forth in Executive Order 11514 and the CEQ Guidelines are intended to ensure that the agencies themselves focus on environmental issues at the seminal stages of agency review, and that they obtain comments of appropriate Federal, state and local instrumentalities at such early time on the agency's own environmental views. These procedures by no means require the agency to take a position on the overall merits of a proposal before the other agency review processes, including hearings, are completed. They serve only to ensure that environmental impact is not treated as the stepsister of all the other issues that were, prior to NEPA, given full agency consideration at all levels of agency review.

In the face of agency assertions that the duties created by NEPA are discretionary, or do not require strict compliance, courts of appeals across the nation have consistently called Federal administrative agencies to account for their failure to meet the "high standard [set] for the agencies." *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109, at 1114 (D.C. Cir. 1971). *See also, inter alia, Ely* v. *Velde*, 451 F.2d 1130 (4th Cir. 1971); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*,

401 U.S. 910 (1971); *Lathan* v. *Volpe,* 455 F.2d 1111 (9th Cir. 1971); and *National Helium Corp.* v. *Morton,* 455 F.2d 650 (10th Cir. 1971). These decisions and that of the Second Circuit in this case, repeatedly reflect the intent of the legislative draftsmen to make NEPA an action-forcing statute which places the environmental burden on the Federal agency in a very special manner at the earliest time in the agency's review processes. 115 CONG. REC. 17451, 17454 (daily ed. Dec. 20, 1969); H.R. REP. No. 765, 91st Cong., 1st Sess. 8-10 (1969); S. REP. No. 296, *supra,* at 19.

Accordingly, the requirements that there be a detailed environmental statement, that it be prepared by a "responsible official" of the agency in accordance with the non-delegable "action-forcing" intent of NEPA, and that it be prepared in time to "accompany the proposal through the existing agency review processes," come directly from Congress. If those requirements are to be altered, it is Congress alone who must do so.*

B. The court below correctly effectuated the language and intent of Congress

The Court of Appeals held:

1. that the NEPA requirement that the environmental impact statement be prepared by a "responsible official" of the FPC could not be delegated to applicants for licenses and that "The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own" (P. 13a); and

2. that the NEPA requirement that the statement "accompany the proposal through the existing agency review

*Almost a dozen bills have been introduced during the present term of Congress to amend NEPA. An annotated listing of these proposals is provided in Appendix A of this brief in opposition.

processes" was violated by FPC procedures, under which the agency statement was prepared at the end of the existing review processes, after a hearing on the merits, and at the time of a decision on the merits, stating:

> ". . . we conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by *its staff* of its own impact statement . . ." (P. 17a).

Petitioner now argues that the Court of Appeals erred in requiring the FPC to do its job in advance of hearings on the merits of license applications. However, the Court of Appeals also considered this question carefully, pointing out that such hearings unquestionably "constitute an existing agency review process" (P. 17a); that, being on the merits of the license application, it was improper to treat them as environmental impact hearings (P. 16a, n. 23); and that the CEQ Guidelines called for prehearing impact statements in CEQ's construction of the statutory language that the statement "accompany the proposal through the existing review processes" (P. 15a-16a).

Quoting NEPA § 102(2), the Court of Appeals concluded that both the language and policy of NEPA

> "went far beyond the requirement that the agency merely consider environmental factors and include those factors in the record subject to review by the courts" (P. 17a).

Thus, NEPA, which placed the job of preparing a comprehensive statement directly on the agency, was not properly served in an adversary hearing because

> ". . . testimony cannot replace a single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes" (P. 14a).

The Court of Appeals also referred to agency inertia which was so distressing to the draftsmen of NEPA (*supra*, p. 5), the "*status quo* syndrome" (P. 14a), and "the danger the review process will bog down" (P. 15a) inherent in agency review processes once progress is made down the road to decision.

C. Since petitioner is asking this Court to rewrite NEPA, the petition should be denied

The sum and substance of petitioner's argument is that Congress, in enacting NEPA, did not take into account some unique aspects of the nature of the FPC and its hearing procedures; that if it had, it would have exempted the FPC; and, having failed to do so, this Court should undertake to rewrite NEPA. It is respectfully submitted that it is not the function of the courts of the United States to rewrite legislation. By the plain terms of NEPA "all agencies" of the Federal government are bound to examine the environmental impact of their proposals for legislation and for "other major federal actions" which significantly affect the quality of the human environment, in time for the results of such examination to be used in the existing agency review processes. There are no exceptions stated in the Act and it is presumptive to assume that the courts will supply omissions or create exceptions which Congress did not.

II

THE DECISION BELOW IMPOSES NO BURDEN ON ANY AGENCY BEYOND THAT EXPRESSLY MANDATED BY CONGRESS AND IS SENSITIVE TO AGENCY PROCEDURES

Both the petition (P. 13) and the brief of the *amicus**

*Brief of Independent Natural Gas Association of America (hereinafter referred to as the "*amicus* brief").

(at 3-4) state, on the one hand, that the decision below places an intolerable burden on the FPC and, on the other, that compliance with that decision is unlikely to expand the scope of consideration already given to environmental issues. It is difficult to understand then, what all the fuss is about. If petitioner already does all the substantive work necessary to comply with the decision below, then only a procedural readjustment is required. Just why delay would be caused by FPC preparation of an impact statement before, rather than after, hearings is nowhere explained. Nor is it explained why the FPC does not have sufficient staff or expertise to prepare an impact statement, but is equipped to do a full scale environmental review during hearings and also to expose shortcomings in the applicant's statement.* Even if staff limitations exist, it is up to Congress, and not this Court, to increase agency budgets or to decrease their workloads.

The petition recites over and over the litany that the decision of the Court of Appeals will impair the effective functioning of federal licensing agencies because it requires uniform, inflexible procedures (P. 8, 12, 13). However, an analysis of the work of the FPC and the actual mandate of the Court of Appeals demonstrates how hollow that complaint really is.

A. The numbers game

Petitioner (P. 12) recites the number of applications and requests which came before the FPC in fiscal 1970 in an attempt to show the burden the decision below will place on the agency. Petitioner concedes, however, that not all

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*The *amicus* brief on the one hand (at 6-7) relies on staff cross-examination and analysis to develop environmental issues and point up shortcomings in the applicant's presentation, while, on the other hand (at 4-5, 8), arguing that the staff is (a) too undermanned and inexpert to prepare an environmental impact statement and (b) not to be trusted with the power allegedly inherent in such work. Surely, it cannot be both ways.

of these actions require impact statements. Interestingly, petitioner does not allege that most or even many of these applications and requests involve impact statements. Inexplicably, petitioner does not also advise this Court that, of those applications which do require impact statements, only a fraction involve contested hearings.*

In fact, according to the CEQ, in the entire history of NEPA through April 30, 1972, the FPC had filed only seven agency environmental impact statements and, during the same period, had filed applicant environmental reports in only 41 license proceedings.** These totals reflect both contested and uncontested cases.

The conclusion is plain that petitioner is attempting to lead this Court to the erroneous conclusion that the decision below brings all proceedings before the FPC to a grinding halt pending compliance with the mandate of the court below. The fact is that only a fraction of the FPC's workload is affected by the holding of the Court of Appeals.

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*It is relevant to note that the license for the $250 million pumped storage plant in this case was approved without any hearings or other contested proceeding. (P. 4). This was also true of the license for two huge companion transmission lines in this case, which were approved not only without a hearing, but also without an impact statement (P. 23a). "While recently some cases have received wide attention, the vast majority of power generating facilities still go unopposed." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON ELECTRIC POWER AND THE ENVIRONMENT, ELECTRICITY AND THE ENVIRONMENT, V-14 (Aug. 1, 1972) [hereinafter cited as CITY BAR REPORT].

**The CAB has never filed an impact statement of any kind in any case. The ICC has filed one 1½ page staff "draft" statement in one case and applicants in two other ICC cases have filed their own environmental report. The impact of NEPA on the Federal Trade Commission, the Federal Maritime Commission, and the Law Enforcement Assistance Administration has likewise been *de minimus*. As for the Atomic Energy Commission, see note at 12, *infra*.

B. The inflexibility argument

Petitioner incorrectly characterizes the opinion below as a straightjacket for "all federal agencies for complying with NEPA" (P. 12).*

First, as petitioner elsewhere points out (P. 2), the holding below is only concerned with the narrow instance of a Federal licensing agency in a contested case requiring a hearing.

Second, petitioner ignores the fact that it is the Congress, in NEPA, which mandated the only aspect of this proceeding which can be termed inflexible, *i.e.*, the preparation and circulation of an environmental impact statement to "accompany the proposal through the existing agency review processes".

Third, the court below in this particular case did not even specify any set procedure for compliance with NEPA, but said, "We leave to the Commission to determine the most efficient procedure for meeting this mandate" (P. 18a). Presumably, the court wanted the FPC and other licensing agencies "to develop procedures tailored for the orderly discharge of their responsibilities" (P. 9).

Indeed, beyond this case the court suggested at least four alternative methods for compliance in recognition of the flexibility to be accorded administrative agencies in getting the impact statement function accomplished: (1) a two-step hearing (P. 16a n. 23), which hearing is specifically contemplated in § 10(e) of the CEQ Guidelines and Executive Order 11514; (2) a "no position" statement (P. 17a n. 24), see, § 6 of CEQ Guidelines; (3) an entirely

*The interest of the Atomic Energy Commission in this case is inexplicable since the court below held the AEC procedures up as a model for the FPC to follow (P. 18a). These procedures predated *Calvert Cliffs' Coordinating Committee* v. *AEC*, *supra*, which required changes in AEC rules not particularly relevant here.

independent agency statement (P. 14a); and (4) the unique procedures used by the AEC (P. 18a).

Additional flexibility is left to the FPC in deciding to which of its officials the impact statement task is to be assigned. For example, the FPC could have a department of its staff handle all impact statements,* or have the specific staff employees assigned to each case do the environmental work in the same way that it previously did prehearing economic and engineering work, or establish special task forces for environmental work on each case or group of similar cases, etc.

To accuse the court below of imposing "an inappropriate, inflexible procedure on the Commission" (P. 13) is to confuse what the court below ordered with what the Congress mandated. The only straightjacket is the one into which petitioner is trying to stuff the opinion of the court below.

C. Some uniformity is the clear intent of Congress and the President

Lastly, to the extent the decision below does impose any uniformity on Federal agencies, such uniformity is consistent with the intent of Congress, the President, and CEQ. *See Calvert Cliffs', supra,* at 1115. Thus, two recent Congressional "oversight" proceedings have recommended that there be "reasonable uniformity of practice among agencies" under NEPA and that NEPA §102(2)(C) be carried out more "uniformly and sytematically" (H.R. REP. No. 316, 92d Cong. 1st Sess. 5-6, 17 (1971); REPORT OF THE COMPTROLER GENERAL TO THE SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION OF THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, IMPROVEMENTS NEEDED IN FEDERAL EFFORTS TO IMPLEMENT

*It is well settled that lack of staff cannot excuse an administrative agency from complying with statutory requirements. *See* text at 10, *supra; Calvert Cliffs, supra,* at 1115.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 1, 13 (May 18, 1972). Similarly, President Nixon, in Executive Order 11514, *supra*, evidenced a concern for uniform and systematic compliance with NEPA. *See especially* §§ 2(b) and (d), 3(f) and (h). To be sure, the whole function of the CEQ Guidelines is to insure such uniformity.

III

THERE ARE NO MERITORIOUS NOVEL ISSUES INVOLVED IN THIS CASE

The FPC has raised a number of baseless issues, which are unusual only because they are so far removed from any authority (including the FPC's own rules, *see e.g.*, 18 C.F.R. § 2.80-2.82) in its attempt to obtain a hearing in this Court. These arise from the following claims:

(A) That, although NEPA requires agencies to designate a "responsible official" to prepare impact statements (which are not decisional documents), the FPC cannot do so from its staff since under its "long-established Commission practice, it is the hearing examiner who is responsible for ruling on the merits of an application in the first instance" (P. 9).

(B) That, prior to the close of an evidentiary hearing on the merits, there are no agency review processes (P. 10), even though the hearing is at the end of extensive agency staff review of the license application, consultation with the applicant, and the formulation of preliminary staff conclusions and recommendations.

(C) That an adversary hearing on the merits of a proposal, leading to a decision on the merits containing an environmental analysis, is an adequate substitute for the NEPA requirement of a detailed impact statement prepared by a "responsible official" early in

the agency review processes (P. 10-11), notwithstanding NEPA's requirement that the impact statement be added to existing agency review processes and although the FPC follows the same NEPA procedure regardless of whether or not an application is contested.

(D) That, although no such distinction is made in the statute, the legislative history, the CEQ Guidelines, or any case ever decided under NEPA, NEPA sets up different requirements for licensing agencies as compared with constructing agencies (P. 12).

A. The NEPA statement is not a decision and the "responsible official" need not be the ultimate decisionmaker

The FPC claims it cannot prepare a prehearing impact statement because it cannot designate any "responsible official" other than the hearing examiner, citing *International Paper Co.* v. *FPC*, 438 F.2d 1349 (2d Cir. 1971), *cert. denied*, 404 U.S. 827 (1971),* and that since the examiner, who is charged with making an initial decision on the merits, cannot make such a decision until a hearing is held, there is no "responsible official" until after the completion of the hearings. This is a striking misconception of the role of a NEPA impact statement, which is neither a decision nor document justifying a decision. It is principally a disclosure instrument, with a purpose of describing to the world and to the agency itself the potential environmental impact of the action proposed and reasonable alternatives to that action. *EDF* v. *Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). There is no requirement in the language of NEPA, nor in the purposes which it

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*The *International Paper* case simply held that the FPC *need not*, under the Freedom of Information Act, disclose internal staff memoranda of legal positions because they were not germane to "final orders" of the Commission.

serves, that the "responsible official" be the ultimate decisionmaker or that he make any decision.

Indeed, the practice of numerous other Federal agencies, including independent agencies with adjudicatory functions, such as the AEC, demonstrates the delegation of the impact statement procedure to "responsible officials" other than the ultimate decision maker. *See e.g.*, 10 C.F.R. § 50, App. D.; 37 Fed. Reg. 15711 (1972) (FCC).

For these reasons, the FPC's point that the staff cannot make final decisions and therefore cannot be responsible for preparing agency impact statements is irrelevant and without merit.

B. The FPC review processes begin when an application is filed; the hearing is an integral part of these processes

Petitioner's argument that the FPC's review processes do not begin until the hearing is closed is incredible on its face and is not in accord with FPC practice.

For example, under the FPC's NEPA Rules, the FPC at the time of application "make[s] an initial review of the applicant's statement [of environmental factors] and issue[s], if necessary, any deficiency letters as to sufficiency of form" (18 C.F.R. § 2.81(b), P. 44a). In addition, at the same time, the FPC decides whether, "based upon the application and the detailed statement, and a preliminary review thereof by the staff, the proposed action may be a major federal action significantly affecting the quality of the human environment." *Id.* Then during the hearing the FPC is required to "offer evidence for the record in support of [its] environmental position." 18 C.F.R. § 2.81(d).

In the instant case, the detailed and definitive nature of positions taken very early in the review process by the FPC can be seen by a memorandum dated March 13, 1970 after petitions to intervene had been filed and more than a year before the prehearing conference from the FPC's

New York Regional Engineer to the Chief of the FPC Bureau of Power.* Moreover, the record as certified to the Court of Appeals also reveals the extent to which alternatives are narrowed and positions harden long before any hearings. *See e.g.*, R. 153-164.**

NEPA refers to "existing agency review processes". By the use of the plural "process*es*", Congress demonstrated its understanding of the various stages of agency review and its intention that a detailed statement prepared by an agency official be available for consideration at each of those stages.

In the FPC, as we have seen, the existing review processes begin shortly after the application is received.† Detailed consideration is given to the application long before any hearing, and the FPC, through its staff, makes an independent investigation of the circumstances of the application and prepares recommendations. Thus, the hearing, while a crucial part of the proceedings, is far down the road in the review process.†† In fact, after the

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*The entire text of the memorandum was reproduced in an appendix to the Planning Board's reply brief in the Court of Appeals.

**"By the time that a trial-type hearing is held . . . [the applicant and the agency] are not likely to embrace alternatives which would mean substantial revisions of the plans that they have worked so long to perfect." BOYER, A RE-EVALUATION OF ADMINISTRATIVE TRIAL-TYPE HEARINGS FOR RESOLVING COMPLEX SCIENTIFIC & ECONOMIC ISSUES, 27 n.162 (1971) (staff report to the Chairman of the Administrative Conference of the U.S.).

†"While in theory the licensing process consists of an application, hearings, and a decision, in practice, commission-applicant bargaining precedes the hearings and even the filing of an application." CITY BAR REPORT, *supra*, at V-35.

††"Upon the filing of the license application—and in many instances, even before the filing—the FPC staff undertakes its review of the proposed project. This review generally includes meetings with the applicant, where changes may be suggested and other details ironed out." *Id.* at IV-24. Hearings are not held until after "the Staff has completed its review". *Id.* at IV-26.

hearing, there comes the Initial Decision, which under Section 8(a) of the APA, 5 U.S.C. § 557(b), is the final decision of the FPC if there is no appeal. If no agency impact statement is prepared until after the hearings, *i.e.*, until the decision, then there will be no agency detailed statement to accompany the proposal through the review processes.

C. The hearing is no substitute for an impact statement

The petition argues that, in "adversary licensing proceedings", no agency environmental impact statement is required prior to the decision on the merits, because "one of the purposes of the hearings is to obtain evidence on the environmental impact of the proposed project for which the license is sought" (P. 2).

This position ignores (a) the FPC's own rules, which prescribe the identical NEPA procedures both in cases in which a hearing is held and in cases in which no hearing is held (18 C.F.R. § 2.81), and (b) a fundamental purpose of NEPA, which is to require the agency itself to make an independent analysis, available for scrutiny at a hearing on environmental impact, rather than to rely on private parties in an adversary hearing to develop these issues.

If the hearing is a substitute for an FPC environmental impact statement, then one would expect some procedure to be set forth in the FPC's NEPA Rules requiring an agency impact statement in uncontested cases where there is no hearing. However, in uncontested cases the NEPA procedure is exactly the same as in contested cases—the applicant presents an environmental analysis as part of its application, and an environmental analysis is part of the final decision. In each instance, the FPC neglects to have a "responsible official" prepare an environmental impact statement, publicize it, and have it accompany the

proposal through the agency review processes. Thus, the FPC's NEPA Rules themselves belie any contention that the hearing in a contested case is intended as a substitute for the agency's own impact statement.

In addition, nothing is more basic to an understanding of NEPA than that it is intended to contain "action-forcing procedures" to get Federal agencies themselves involved in independent, comprehensive environmental planning early in their review processes. *See* text at 5, *supra*. It is a subversion of that basic principle to leave the development of environmental issues to litigants in an adversary proceeding, even where the agency's staff is a participant. As Circuit Judge Kaufman pointed out:

> "The Commission appears to be content to collate the comments of other federal agencies, its own staff and intervenors and once again to act as an umpire. The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions." P. 13a.

and

> "[Staff] testimony cannot replace a single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes." P. 14a.

Finally, the recent Comptroller General's Report, *supra*, noted the importance of prehearing impact statements as crucial to fulfilling that aspect of NEPA which calls for more extensive public participation in Federal decision-making (at 33-36).

To wait until all the evidence is in before commencing agency NEPA procedures surely eviscerates the policy of

the statute, as well as its explicit requirement that the agency's comprehensive statement "accompany the proposal through existing agency review processes."

D. The distinction between a licensing and constructing agency is irrelevant to NEPA

The petition criticizes the Court of Appeals by stating that it "fails to recognize the critical distinction between licensing and constructing agencies" (P. 12). Again, this is a confusion between what the court decided and what Congress mandated. NEPA is a mandate to "*all* agencies of the Federal Government," and makes no distinction between licensing and constructing agencies. Indeed, any such distinction, in the face of such clear statutory language, places an impermissible gloss on the statute.*

Nevertheless, even the factual distinction suggested by the petition is not useful under NEPA. First, the legislative history of NEPA is explicit that one of the purposes of NEPA is to require federal agencies to use procedures which would insure comprehensive environmental planning. S. REP. No. 296, *supra*, at 5. Surely, the first step is for licensing agencies to put their respective houses in order and no longer leave the decision on the course of project development exclusively to license applicants, who historically have controlled this course by the timing and order of their license applications. NEPA commands all agencies forcefully to seize the reins of comprehensive planning and decision-making. Consequently, that licensing agency procedures have in the past been subject to indiscriminate use by private applicants, is an argument

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*The Senate Report clearly faced this issue and treats the "licensing functions of independent agencies" for NEPA purposes as no different than "the ongoing activities of the regular Federal agencies". S. REP. No. 296, *supra*, at 14.

for the application of NEPA to those agencies, and not for any exemption.*

In the *amicus* brief (at 5), reference is made to the great deal of work done in preparation of an applicant's impact statement in one case. Assuming it to be true that "more than two and one-third man years" of time was devoted, this graphcially demonstrates the ability of a licensing agency to utilize the resources of applicants in order to get data for the agency's impact statement.

Thus, not only is there no support in NEPA for a distinction between licensing and constructing agencies, but also the factual distinctions proposed by the petitioner cannot withstand analysis.

CONCLUSION

The decision of the court below was correct. Since no unusual or important issues or conflicts among courts are involved, and since the relief petitioner wants can come only from Congress, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 9, 1972

*Petitioner's observation (P. 12) that a licensing agency "lacks control" of information is fully answered by the court below which specifically upheld the use of the applicant's statement for *information gathering* purposes (P. 17a n.24).

APPENDIX A

Legislation Introduced in Congress Relating to Modifications of Requirements of the National Environmental Policy Act 1970.

H.R. 13752: Amends NEPA by allowing the Atomic Energy Commission to issue "Interim Operating Licenses" for nuclear power plants to operate at 100% of capacity without first filing the required final Environmental Impact Statement. (Passed by the House; now before Senate Interior Committee).

H.R. 14103: Amends NEPA to allow the Environmental Protection Agency to issue water discharge permits under the 1899 Refuse Act without filing environmental impact statements. There are 20,000 permit applications awaiting this amendment. (Before the Merchant Marine and Fisheries Committee).

H.R. 14137: Amends NEPA to allow the President at his discretion to declare an emergency, suspending compliance with the provisions of NEPA for a particular project for the 180 day period. No hearings need be held to examine whether an emergency really exists. A similar bill is being proposed in the Senate.

H.R. 5277: Power Plant Siting Bill: Sets up a procedure for the long range planning and state certification of bulk power generating facilities while specifically eliminating the need to file environmental impact statements as required by NEPA. (Now before House Commerce and Senate Commerce committees).

H.R. 11066: Power Plant Siting Bill: Under "emergency conditions", would allow power plants to be constructed and operated in violation of all local, state, and Federal laws, including NEPA. (Now before House Commerce and Senate Commerce committees).

S. 3381: Would set up regional commissions for administering public works development projects. Authorized projects would not need environmental impact statements as required by NEPA.

Federal-Aid-Highway Act for 1972: Amendments are being drafted to the Highway Transportation Act which would relieve the Department of Transportation of responsibility for filing Environmental Impact Statements for highway projects, as now required by NEPA.

* * * * *

H.R. 14655, passed by Congress and signed by the President, combined three separate bills as follows:

H.R. 14065: Amends the Atomic Energy Act provisions for interim operating licenses for nuclear plants by altering the traditional hearing process to short cut NEPA.

H.R. 13731: Amends the Atomic Energy Act to provide: early site authorization prior to construction of a nuclear power plant; an optional legislative-type hearing (no discovery or cross-examination by opponents of the plant) for the operating license only after environmental groups first proved that such a hearing was necessary "Interim operating licenses" to be issued without complying with NEPA.

H.R. 13732: Amends the Atomic Energy Act allowing the Atomic Energy Commission to give "Temporary Operating Authorization" for nuclear plants before completion of the Commission's operating license procedure and compliance with the provisions of NEPA. Judicial review is virtually eliminated.